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SUPREME COURT OF THE STATE OF WASHINGTON

CHADWICK FARMS OWNERS ASSOCIATION, a Washington
nonprofit corporation,
Plaintiff/Petitioner/Appellant

v.

FHC, LLC, a Washington limited liability company,
Respondent/Defendant/Third Party Plaintiff/Cross Appellant

v.

AMERICA 1ST ROOFING & BUILDERS, INC., a Washington
Corporation; CASCADE UTILITIES, INC., a Washington corporation;
MILBRANDT ARCHITECTS, INC., P.S., a Washington corporation;
PIERONI ENTERPRISE, INC., d/b/a PIERONI'S LANDSCAPE
CONSTRUCTION, a Washington corporation, TIGHT IS RIGHT
CONSTRUCTION, a Washington corporation; GUTTER KING, INC., a
Washington Corporation, Third Party Defendants.

BRIEF OF CROSS RESPONDENT PIERONI ENTERPRISES, INC.

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A. Cross Response to Assignments of Error

Cross Respondent Pieroni Enterprise, Inc. d/b/a Pieroni's Landscape Construction, hereinafter "Pieroni" believes the trial court did not err in granting summary judgment to Pieroni on September 30, 2005, and believes the issue pertaining to the assignments of error on the Cross Appeal is: does a Washington limited liability company have standing to prosecute lawsuits after it has been administratively dissolved and has had its certificate of formation cancelled?

B. Statement of the Case

This case involves alleged construction defects regarding the Chadwick Farm Condominium project, hereinafter "Project". (CP 121-125). FHC, LLC was formed for purposes of constructing the Project. (CP 1-8) FHC, LLC acted as the developer for the project and acted as its own general contractor, and FHC, LLC contracted with Cross Respondents including Pieroni to perform construction services for the Project. (CP 139-152). Appellant Chadwick Farms Owners Association filed its Complaint against FHC, LLC for alleged breach of warranty and construction defects on the Project on August 18, 2004. (CP 121-125). FHC, LLC filed its Third-Party Complaint against various sub-contractors on May 11, 2005. (CP 139-152).

On March 24, 2003, the secretary of state for the State of Washington issued a Certificate of Administrative Dissolution to FHC, LLC, stating it was administratively dissolved as of March 24, 2003 in accordance with

RCW 25.15.285. (CP 13). At no time since March 24, 2003 had FHC,LLC applied for reinstatement following the administrative dissolution of March 24, 2003. (CP 76). FHC,LLC conceded that the secretary of state cancelled its certificate of formation on March 24, 2005, pursuant to Washington's Limited Liability Act. (CP 1-8). FHC,LLC did not file its Third Party Complaint against Pieroni until May 11, 2005, well after its certificate of formation was cancelled by the secretary of state. (CP 139-152).

Because FHC,LLC failed to prosecute its claims against Pieroni before the secretary of state issued its certificate of administrative dissolution and before the secretary of state cancelled FHC,LLC's certificate of formation on March 24, 2005, FHC,LLC lacked standing to prosecute claims against Pieroni in the name of, for, or on behalf of, the dissolved limited liability company.

The Washington Limited Liability Act mandates that a dissolved limited liability company windup affairs, including prosecuting actions, before the dissolved LLC's certificate of formation is cancelled. RCW 25.15.295. FHC,LLC failed to prosecute its claims against Pieroni before the secretary of state issued cancelled its certificate of formation. FHC,LLC waited nearly two months after the secretary of state cancelled its certificate of formation to file its third-party complaint. As such, FHC,LLC lacked standing to prosecute claims against Pieroni in the name of, for, or on behalf of, the dissolved limited liability company.

C. Argument

1. Standard of Review

Interpretation of a statute is a question of law, which appellate courts review de novo using the error of law standard. *Friends of the Columbia Gorge, Inc. v. Washington State Forest Practices & Appeals Board*, 129 Wash. App. 35, 46, 108 P.3d 354, 359 (2005). In construing a statute, the appellate courts give effect to all its language so that “no portion is rendered meaningless or superfluous.” *Id.*, citing *Muckleshoot Indian Tribe v. Department of Ecology*, 112 Wash. App. 712, 720, 50 P.3d 668 (2002), *review denied*, 1150 Wn.2d 1016, 79 P.3d 446 (2003).

2. **Once an LLC’s certificate of formation is cancelled by the secretary of state, the dissolved LLC does not have standing to prosecute any lawsuits.**

FHC, LLC no longer had standing to prosecute claims against Pieroni once the secretary of state cancelled its certificate of formation. The limited liability company (“LLC”) is a relatively new entity that has emerged in recent years as an attractive vehicle to facilitate business relationships and transactions. In 1994, Washington passed the Revised Code of Washington (“RCW”) 25.15 authorizing the use of the new form of business entity. Wash. Rev. Code 25.15 (1994). Washington’s Limited Liability Companies Act (“LLC Act”) defines an LLC as follows:

“Limited liability company” and “domestic limited liability company” means a limited company having one or more members that is organized and existing under this chapter.

Wash. Rev. Code 25.15.005(4).

In order to form a limited liability company in Washington, one or more persons must execute a certificate of formation and file it with the secretary of state. RCW 25.15.070. A limited liability company formed under the LLC Act shall be a separate legal entity, the existence of which as a separate legal entity shall continue *until* cancellation of the limited liability company's certificate of formation. *Id.* (Emphasis added).

Once created, there are three ways an LLC certificate of formation can be cancelled: by action of the LLC, judicial action or by action of the secretary of state. RCW 25.15.270 states, in pertinent part:

A limited liability company is dissolved and its affairs shall be wound up upon first to occur of the following:

- 1.) The dissolution date, if any, specified in the certificate of formation. If a dissolution date is not specified in the certificate of formation, the limited liability company's existence will continue until the first to occur of the events described in subsections (2) through (6) of this section. If a dissolution date is specified in the certificate of formation, the certificate of formation may be amended and the existence of the limited liability company may be extended by vote of all the members;
- 2.) The happening of events specified in a limited liability company agreement;
- 3.) The written consent of all members;
- 4.) Unless the limited liability company agreement provides otherwise, ninety days following an event of dissociation of the last remaining member, unless those having the rights of assignees in the limited liability company under RCW 25.15.130(1) have, by the ninetieth day, voted to admit one or more members, voting as though they were members, and in the manner set forth in RCW 25.15.130(1);

5.) The entry of a decree of judicial dissolution under RCW 25.15.275; or

6.) The expiration of two years after the effective date of dissolution under RCW 25.15.285 without the reinstatement of the limited liability company.

(Emphasis added).

In the present case, there is no dispute that FHC,LLC failed to reinstate itself within the two years after it was dissolved. FHC,LLC concedes that it did not even attempt to reinstate itself. (CP 76).

RCW 25.15.295(2) plainly states how long a dissolved LLC has to windup its affairs, including the prosecution of lawsuits. RCW 25.15.295(2) states:

Upon dissolution of a limited liability company and until the filing of a certificate of cancellation as provided in RCW 25.15.080, the persons winding up the limited liability company's affairs may, in the name of, and for, and on behalf of, the limited liability company, prosecute and defend suits, whether civil, criminal, or administrative, gradually settle and close the limited liability company's business, dispose of and convey the limited liability company's property, discharge or make reasonable provision for the limited liability company's liabilities, distribute to the members any remaining assets of the limited liability company.

(Emphasis added).

RCW 25.15.080 provides in pertinent part:

A certificate of formation shall be cancelled upon the effective date of the Certificate of Cancellation, or as provided in 25.15.290, or upon the filing of articles of merger . . . (Emphasis added).

RCW 25.15.290 states:

- 1) A limited liability company administratively dissolved under RCW 25.15.285 may apply to the secretary of state for reinstatement within two years after the effective date of dissolution. The application must:
 - (a) Recite the name of the limited liability company and the effective date of its administrative dissolution;
 - (b) State that the ground or grounds for dissolution either did not exist or have been eliminated; and
 - (c) State that the limited liability company's name satisfies the requirements of RCW 25.15.010.
- 2) If the secretary of state determines that the application contains the information required by subsection (1) of this section and that the name is available, the secretary of state shall reinstate the limited liability company and give the limited liability company written notice, as provided in RCW 25.15.285(1), of the reinstatement that recites the effective date of reinstatement. If the name is not available, the limited liability company must file with its application for reinstatement an amendment to its certificate of formation reflecting a change of name.
- 3) When the reinstatement is effective, it relates back to and takes effect as of the effective date of the administrative dissolution and the limited liability company may resume carrying on its business as if the administrative dissolution had never occurred.
- 4) If an application for reinstatement is not made within the two-year period set forth in sub-section (1) of this section, or if the application made is not granted, the secretary of state shall cancel the limited liability company's certificate of formation.

Thus, after an LLC is dissolved by the secretary of state issuing a Certificate of Administrative Dissolution, the LLC has two years after the

effective date of the dissolution to finish winding up its affairs or it can apply to the secretary of state for reinstatement. Since FHC,LLC did not apply for reinstatement during the applicable two-year period, its certificate of formation was cancelled, pursuant to RCW 25.15.290(4) on March 24, 2005. Thus, FHC,LLC no longer had standing to prosecute lawsuits under RCW 25.15.295(2).

FHC,LLC does not assert that anything more needs to be done to cancel the certificate of formation other than this passage of time. FHC,LLC does not argue that the Limited Liability Company Act is vague, or that FHC,LLC even had standing as of March 25, 2005 to file the third-party complaint against Pieroni. As with all corporate entities in Washington, failure to reinstate a dissolved entity within the permitted time period results in lack of standing to bring an action against another party. *Pacesetter v. Fasules*, 53 Wash. App. 463, 767 P.2d 261 (1989) (corporation's failure to apply for reinstatement within the time permitted results in lack of standing to bring an action); *Globe Constr. Co. v. Yost*, 173 Wash. 522, 527, 23 P.2d 892 (1933) (once reinstatement period passes, corporation is "dead"); *Peck v. Linney*, 97 Wash. 103, 114 165 P. 1080 (1917) (corporation in "dormant condition" cannot sue); *Gamble v. Alder Group Mining & Smelting Co.*, 5 Wash.2d 578, 582, 105 P.2d 811 (1940) (following expiration of reinstatement period, corporation cannot maintain an action).

FHC,LLC was administratively dissolved on March 24, 2003, it had until March 24, 2005 to apply for reinstatement, but it chose not to do so. On March 24, 2005 FHC,LLC's certificate of formation was cancelled by the secretary of state; pursuant to the unambiguous language of RCW 25.15.295(2), it had no standing to pursue a claim against Pieroni thereafter. FHC,LLC's Motion for Summary Judgment, and Opening Brief herein are essentially in agreement with the arguments previously and currently stated by Pieroni. The court therefore must affirm the trial courts order of September 30, 2005, granting Pieroni's motion for summary judgment.

3. FHC,LLC does not have standing to prosecute claims against Pieroni irrespective of the outcome of Appellant Chadwick Farms Owners Association's Appeal.

FHC,LLC asserts that should the Court find that the Appellant is permitted to pursue its claims against FHC,LLC, FHC,LLC must in turn be allowed to pursue the claims against Pieroni. There are substantial differences in the two situations that make this incorrect.

First, FHC,LLC knew that it was involved in litigation concerning the Project during the time that it could have taken action to reinstate itself with the secretary of state if it wanted to prosecute claims during the "winding up" period provided under RCW 25.15.295(2). The Complaint by Appellant Chadwick Farms Homeowners Association was filed on August 18, 2004. FHC,LLC had approximately 7 months to seek reinstatement and avoid the cancellation of its certificate of formation.

Instead it chose to allow the certificate of formation to be cancelled, and on April 5, 2005 filed its Answer to Chadwick Farm's Complaint, and alleged that it was a dissolved entity. CP 126-129. FHC, LLC was

utilizing the law to bar the claims of Appellant. Since FHC,LLC agrees that the law is clear, and agrees with Pieroni's argument that it did not have standing to prosecute claims after March 24, 2005, and since FHC,LLC chose not to take any action to maintain its status as an LLC after it was aware of the lawsuit, it should be bound by the law.

Appellant in its Opening Brief, cites to Senate Bill 6531, for the position that Appellant's claims against FHC,LLC should survive the cancellation of the certificate of formation. (Opening Brief, Pg. 24). That statute would not provide FHC,LLC any additional time after the cancellation of its certificate of formation to prosecute claims. The statute only provides for additional time for claims to be made against the dissolved LLC.

The pertinent language reads, "[T]he dissolution of a limited liability company does not take away or impair any remedy available against that limited liability company" (Senate Bill 6531 emphasis added)

The bill only relates to actions or proceedings against the limited liability company. It does not state that the affirmative claims that the dissolved limited liability company survive if brought within three years after the dissolution. While Senate Bill 6531, if applicable to this case, may benefit the Appellant, it would not benefit Cross-Appellant FHC,LLC. The reasoning seems clear, FHC,LLC had the ability to change its status by reinstating itself, if it wanted to pursue claims. It chose not to. Therefore, even if Appellant Chadwick Farms prevails on its appeal, the court must affirm the trial courts under granting Pieroni's motion for summary judgment.

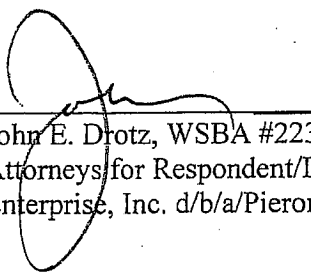
D. Conclusion

The trial court did not err in granting Third-Party Defendant, Pieroni Enterprise, Inc. d/b/a Pieroni's Landscape Construction, Inc.'s Motion for Summary Judgment. FHC, LLC's certificate of formation was Cancelled by the secretary of state prior to FHC, LLC bringing the underlying lawsuit against Pieroni, therefore under the Washington Limited Liability Company Act it lacked standing to prosecute the Third-Party Complaint against Pieroni.

RESPECTFULLY SUBMITTED, this 2nd day of June, 2006.

CLEMENT & DROTZ PLLC

By


John E. Drotz, WSBA #22374
Attorneys for Respondent/Defendant/Third Party Defendant
Enterprise, Inc. d/b/a/Pieroni's Landscape Construction

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06 CERTIFICATE OF SERVICE
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The undersigned ~~Clerk~~ ^{CLERK} ~~HERRITT~~ certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a part to or interested in the above-entitled action, and competent to be a witness herein:

On the date given below, I caused to be served the BRIEF OF CROSS RESPONDENT PIERONI ENTERPRISES, INC. on the following individuals in the manner indicated:

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Dated this 2nd day of June, 2006 at Seattle, Washington.

Debra Rakentine
Debra Rakentine

Legal Assistant to John E. Drotz

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TO E-MAIL